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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

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FILED

THOMAS MARRA,
Petitioner,

v.

COMMISSIONER JOHN ARMSTRONG,
Respondent.

PRISONER

Case No. 3:00cv233 (SRU)

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner is currently confined at the State Correctional Institution at Camp Hill in Camp Hill, Pennsylvania. He brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his state convictions. For the reasons that follow, the petition is denied without prejudice.

Background

On August 10, 1988, after a jury trial in the Connecticut Superior Court for the judicial district of Fairfield at Bridgeport, the petitioner was convicted of one count of accessory to kidnapping in the first degree, one count of conspiracy to commit kidnapping in the first degree, two counts of attempted kidnapping in the first degree, two counts of arson in the second degree and two counts of larceny in the second degree. On September 30, 1988, he was sentenced to a total effective term of imprisonment of sixty-five years.

His conviction was affirmed on direct appeal. See State v. Marra, 215 Conn. 716, 579 A.2d 9 (1990). On direct appeal, the

petitioner raised five claims: (1) there was insufficient evidence to support his conviction on the charge of accessory to kidnapping in the first degree, (2) the trial court improperly denied his motion for mistrial as a result of prejudicial publicity, (3) the trial court permitted the state's rebuttal witness, who had a history of psychological problems, to testify even though defense counsel was unable to obtain the witness's medical or psychological records, (4) the trial court failed to grant his motion for mistrial after a clerk read previously redacted portions of a warrant affidavit referring to pending murder charges against the petitioner, and (5) the trial court improperly permitted the state to introduce evidence of the petitioner's uncharged larcenous misconduct when two of the charges for which the petitioner was being tried involved thefts. Id. at 719-20, 579 A.2d at 11.

On March 30, 1990, the petitioner filed a petition for a writ of habeas corpus in state court on the grounds that he was afforded ineffective assistance of trial and appellate counsel and was denied a fair trial. Specifically, the petitioner claimed that trial counsel failed to prepare him adequately to testify at trial, explain the consequences of giving up his right to remain silent, conduct an adequate investigation, subpoena the psychological records of the state's rebuttal witness, move for a mistrial as a result of unfair publicity, object to the presence

of a juror who knew members of the family of another judge within the same courthouse, and failed to disclose a conflict of interest. See Marra v. Commissioner of Correction, 51 Conn. App. at 306, 721 A.2d at 1238-39. The petitioner claimed that appellate counsel was ineffective because he failed to include the psychological records of the state's rebuttal witness in the record on appeal and raise as a ground for appeal a suppression issue relating to statements made by the petitioner during a polygraph examination. See id. at 306-07, 721 A.2d at 1239. The petitioner also claimed in his state habeas petition that he has been denied a fair trial because the state withheld exculpatory information in the form of taped interviews or statements from witnesses or co-defendants. See id. at 307, 721 A.2d at 1329. The petition was dismissed on October 2, 1997, and the trial court denied the petitioner's request for certification to appeal the denial. (See Resp't's App. H at 13-25, 26-27.) The Connecticut Appellate Court affirmed the denial of certification. See Marra v. Commissioner of Correction, 51 Conn. App. 305, 721 A.2d 1237 (1998), cert. denied, 247 Conn. 961, 723 A.2d 816 (1999).

On February 4, 2000, the petitioner commenced this action challenging his conviction on ten grounds: (1) his conviction was obtained in violation of his privilege against self-incrimination in that, on twenty-two separate occasions, he requested and was denied the presence of an attorney during a

polygraph examination; (2) the state's attorney withheld exculpatory information; (3) he was afforded ineffective assistance of trial counsel; (4) he was afforded ineffective assistance of appellate counsel; (5) there was insufficient evidence at trial to support his conviction on the charge of accessory to kidnapping in the first degree; (6) the trial court improperly denied his motion for mistrial on the ground of prejudicial publicity; (7) the trial court permitted the state's rebuttal witness to testify even though the state did not provide defense counsel with the witness's psychological records; (8) the trial court improperly denied his motion for mistrial after the clerk read previously redacted statements referring to pending murder charges against the petitioner; (9) the trial court permitted the state to introduce prejudicial evidence of uncharged larcenous conduct; and (10) defense counsel was not provided all taped interviews and statements made by witnesses and co-defendants.

In his response, the respondent notes that the petitioner has not exhausted all of his grounds for relief by presenting each ground to the Connecticut Supreme Court.

Standard of Review

A prerequisite to habeas relief under section 2254 is the exhaustion of all available state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York,

696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. Ordinarily, the exhaustion requirement has been satisfied if the federal issue has been properly and fairly presented to the highest state court either by collateral attack or direct appeal. See O'Sullivan, 526 U.S. at 843 (citing Brown v. Allen, 344 U.S. 443, 447 (1953)). "[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition." Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990).

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must "utilize[] all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). A petitioner must present his federal constitutional claims to the highest state court before a federal court may consider the

merits of the claims. See Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process." O'Sullivan, 526 U.S. at 845. In addition, mixed petitions, those containing exhausted and unexhausted claims, must be dismissed in their entirety. See Slack v. McDaniel, ___ U.S. ___, 120 S. Ct. 1595, 1605 (2000) (citing Rose v. Lundy, 455 U.S. at 510).

Discussion

The court has carefully compared the grounds raised in this petition with those presented on direct appeal and in the state habeas petition. Grounds five through nine in this petition are the same grounds raised on direct appeal to the Connecticut Supreme Court. Thus, the petitioner has exhausted his state court remedies with respect to grounds five through nine.

Grounds two and ten in this petition appear to be included within the petitioner's claim in his state habeas petition that he was denied a fair trial. This claim was addressed by the Connecticut Appellate Court in a footnote, see Marra v. Commissioner of Correction, 51 Conn. App. at 310 n.2, 721 A.2d at 1240 n.2, and argued in the petition for certification filed in the Connecticut Supreme Court. (See Resp't's App. J.) Ground four in this petition is identical to the claim of ineffective assistance of appellate counsel raised in the state courts.

Thus, the petitioner appears to have exhausted his state court remedies with regard to grounds two, ten and four in the federal petition.

All of the claims of ineffective assistance of trial counsel raised in the state courts are included in ground three in this petition. The petitioner has included in this petition, however, an allegation that trial counsel forced him to testify against his wishes. This issue has not been presented to any state court. Thus, the petitioner has not fully exhausted his claim of ineffective assistance of trial counsel.

Finally, the first ground for relief in this petition is a claim that the petitioner was denied counsel during his polygraph examination and that his conviction was obtained in violation of his privilege against self-incrimination. The court cannot discern any evidence that this claim was presented to any state court either collaterally or on direct appeal. Thus, the petitioner had not exhausted his state court remedies with regard to the first ground for relief.

Because the petitioner has not afforded the Connecticut Supreme Court an opportunity to rule on every ground for relief, this petition is a mixed petition which must be dismissed in its entirety. See Slack, 120 S. Ct. at 1605.

Conclusion

The petition for a writ of habeas corpus [doc. #1] is DENIED without prejudice. The petitioner may refile a federal habeas

action after all of his claims have been presented to the Connecticut Supreme Court.¹ The Clerk is directed to enter judgment and close this case.

The Supreme Court has recently held that,

[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 120 S. Ct. at 1604. In addition, the Court stated that, [w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id. This court concludes that a plain procedural bar is present here; no reasonable jurist could conclude that the petitioner has exhausted his state court remedies with regard to all grounds for relief or that the

¹ If the petitioner does not wish to exhaust the identified grounds for relief, he may refile a federal habeas petition containing only the exhausted grounds. He is cautioned, however, that there is now a one-year statute of limitations on petitions for writs of habeas corpus filed by state prisoners. See 28 U.S.C. § 2244(d)(1). The limitations period commenced on May 6, 1999, when the time for filing a petition for certiorari in the United States Supreme Court expired, and was tolled when the petitioner filed this action on February 4, 2000. Thus, the petitioner has used 275 days of the 365 day limitations period.

petitioner should be permitted to proceed further. Accordingly,
a certificate of appealability will not issue.

SO ORDERED this 27th day of January 2001, at Bridgeport,
Connecticut.


Stefan R. Underhill
United States District Judge

[REDACTED]